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No. 001840

In the

SUPREME COURT OF THE UNITED STATES

MICHAEL LEAVITT, Governor of the State of Utah; ROBIN ARNOLD-WILLIAMS, Director of the Utah Department of Human Services; and KEN PATTERSON, Director of the Division of Child and Family Services,

Petitioners,

v.

DAVID C., et al., on behalf of themselves and others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTIONS PRESENTED

This section 1983 suit was filed to reform the Utah Division of Child and Family Services, the state agency charged with protecting children from abuse and neglect. Before any answer or admissions by defendants, the parties negotiated a pretrial Settlement Agreement. In it, the parties identified 93 substantive practices to be implemented by the agency but also unconditionally stipulated that the Settlement Agreement would terminate after four years. The Agreement was adopted by the court on August 28, 1994 in a Consent Decree. Four years later, a substitute district court judge "modified" the decree by excising the unconditional termination provision. She did so because defendant state officials had not yet substantially complied with the substantive provisions. The Tenth Circuit Court of Appeals affirmed. Accordingly, the questions presented are:

1. Does a federal court's inherent equitable power to modify an unlitigated consent decree extend to material terms bargained for by State defendants?

2. Is the unconditional, four-year time limit here on federal court stewardship of the State defendants' child protection agency such a material term?

PARTIES TO THE PROCEEDING

In addition to David C., other named plaintiffs included: Nicholas N., Dora D., Martin B., Agnes W., and Kenny G., by their next friend Donna Brown; Bella, Peter, Esther and Mary F., by their next friend Carol T.; Jonas, Brenda, Mercy and Cynthia A., and Caroline, Sarah, and Timothy P., by their next friend Shirley Z.

These individuals represent a class certified by the district court to include: (1) all children who are or will be in custody of the Utah Department of Human Services' Division of Child and Family Services or who have been or will be placed by the Department in out-of-home care; and (2) all children who are or will be known to the Department by virtue of a report of abuse or neglect. App. 18.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS TO GRANT THE PETITION 11

I. **The Courts of Appeals are Divided as to Whether a Federal District Court has the Authority to Rewrite a Material Term of an Unlitigated Consent Decree** 12

II. **The Tenth Circuit's Decision Conflicts with *Firefighters Local Union No. 784 v. Stotts*, 467 U.S. 561 (1984)** 16

III. **The Tenth Circuit Erroneously Determined that Excising the Termination Provision Does Not Materially Alter the State Defendants' Obligations** 20

IV. **The Tenth Circuit's Decision Raises Serious Federalism and Separation-of-Powers Concerns and Will Discourage Use of Pretrial Consent Decrees** 20

CONCLUSION 26

APPENDIX 27

TABLE OF AUTHORITIES

CASES

Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991) 22, 23

Commonwealth of Pennsylvania v. Local Union 542, 807 F.2d 330 (3rd Cir. 1986) 14

David C. v. Leavitt, 13 F. Supp. 2d 1206 (D. Utah 1998) 1

David C. v. Leavitt, 242 F.3d 1206 (10th Cir. 2001) 1

Dixon v. Pro Image, Inc., 987 P.2d 48 (Utah 1997) 21

Duran v. Elrod, 760 F.2d 756 (7th Cir. 1985) 24

EEOC v. Local 40, 76 F.3d 76 (2nd Cir. 1996) 15

Firefighters Local Union No. 784 v. Stotts, 467 U.S. 561 (1984) 16, 17, 18, 23

Fox v. HUD, 680 F.2d 315 (3rd Cir. 1982) 10, 14

Harris v. City of Philadelphia, 137 F.3d 209 (3rd Cir. 1998) 13

Heath v. DeCourcy, 888 F.2d 1105 (6th Cir. 1989) 13

Holland v. New Jersey Dep't of Corrections, 2001 WL 326853 (3rd Cir. April 4, 2001) 14

Hughes v. United States, 342 U.S. 353 (1952) 14, 15, 18

Lorain NAACP v. Lorain Board of Education, 979 F.2d 1141 (6th Cir. 1992), ... 10, 12

Milliken v. Bradley, 433 U.S. 267 (1977) 23

Plateau Mining Co. v. Utah Div. of State Lands, 802 P.2d 720 (Utah 1990) 21

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) ..... passim

Sinclair Oil Corp. v. Scherer, 7 F.3d 191 (10th Cir. 1993) 21

System Federal No. 91 v. Wright, 364 U.S. 642 (1961) 18

United States v. Armour & Co., 402 U.S. 673 (1971) 14, 15, 18, 19

United States v. Atlantic Refining Co., 360 U.S. 19 (1959) 14, 15, 18

United States v. Ford Motor Co., 335 U.S. 303 (1948) 17

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 11, 18

United States v. International Brotherhood of Teamsters, 141 F.3d 405 (2nd Cir. 1998) 15

United States v. International Harvester Co.,
274 U.S. 693 (1927) 17

United States v. Michigan, 940 F.2d
143 (6th Cir. 1991) 13

United States v. Swift & Co., 286 U.S.
106 (1932) 11, 16

Willie M. v. Hunt, 732 F.2d 383 (4th Cir. 1984) 22

STATUTES

28 U.S.C. § 1254 2

18 U.S.C. § 3626 (2000) 23, 24

SECONDARY AUTHORITIES

Alan Effron, "Federalism and Consent Decrees
Against State Governmental Entities,"
88 *Colum. L. Rev.* 1796 (1988) 22

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Litigation: The Obstacles to Compliance,"
28 *Colum. J. L. & Soc. Probs.* 83 (1994) 22, 25

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Decrees in Structural Reform Litigation,"
1986 *U. Ill. L. Rev.* 725 25

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Jurisdiction Over Consent Decrees in
Structural Reform Litigation," 42 *U.*

Miami L. Rev. 401 (1987) 19

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW

The opinion of the Tenth Circuit Court of Appeals is reported as *David C. v. Leavitt*, 242 F.3d 1206 (10th Cir. 2001), and included here at Appendix ("App.") 1-14. The district court's unpublished order of October 18, 1999 modifying the Consent Decree appears at App. 15-16. The district court's earlier memorandum decision is reported at 13 F. Supp.2d 1206 (D. Utah 1998), and reproduced here at App. 17-33.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered March 9, 2001. App. 1. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiffs filed this institutional reform class action against Utah officials in February 1993, alleging numerous violations of the federal constitution and federal and state statutes in the operation of Utah's child protection system. After the district court postponed indefinitely the deadline for defendants' answer, the parties embarked on a full year of settlement negotiations. App. 2.

During this period, the Utah Legislature enacted the Child Welfare Reform Act, effective July 1, 1994,[1] codifying many federal statutory requirements and provisions eventually included in the parties' Settlement Agreement, which was preliminarily approved by the district court in June 1994. The Act imposed on Utah child protection workers and juvenile courts stringent new time limits and standards for removal, abuse or neglect adjudications, reunification efforts, review hearings, rehabilitation of parents or parental rights terminations, and timely permanent placements for abused and neglected children. In addition, responsibility for enforcement of the Act and prosecution of child protection cases was moved from the county attorneys to the Utah Attorney General.

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[1]1994 Utah Laws ch. 260 (now see Utah Code Ann. §§ 78-3a-301 to -414 (1996 & Supp. 2000)).

The parties' Settlement Agreement set forth practices required in every major aspect of the Utah Division of Child and Family Services' operations. More than 50 pages long, it contained 93 substantive provisions covering, among other things: screening and investigation of child abuse or neglect complaints; protective services for alleged victims; family services; shelter care; quality and safety in foster care placements for children in State custody; medical and mental health care and education for foster children; staff training, supervision, and accountability; and timely case review and permanency planning. C.A. App. 148-201.[2] The defendant Utah officials never conceded that the Utah Division of Child and Family Services had ever operated in violation of federal statutes or the federal Constitution, and no court has found any such violations.

In Section XI of the Settlement Agreement, titled "Monitoring and System Accountability," the parties created a Monitoring Panel to evaluate defendants' compliance with the 93 substantive provisions. C.A. App. 197-99. The parties left it to the Panel to devise compliance measures and to fix an appropriate level of compliance (up to 100%) for each provision that would result in a Panel finding of compliance. *Id.* at 199.

In quarterly reports, the Monitoring Panel was to make findings of defendants' compliance or noncompliance with each of the 93 provisions applicable during the review period. Within two weeks of noncompliance findings, defendants were to submit a Corrective Action Plan, which the Panel had two weeks to approve or allow defendants to revise. If the latter, the

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[2]Citations in this format are to the appendix of record materials petitioners submitted to the Tenth Circuit Court of Appeals.

Panel was to approve the revised plan or create a Corrective Action Plan of its own. At the end of a Plan, the Panel was to make findings about whether compliance was achieved. The Panel's findings could then be challenged in district court, which was to enter its own compliance or noncompliance findings after de novo review of the evidence. *Id.* at 198-200.

The next subsection of the Settlement Agreement, section XI-J, entitled "Enforcement of the Agreement," states:

> The Agreement constitutes a final and binding determination of plaintiffs' claims and entitlement to relief. These claims, and any defenses to these claims, are merged into and resolved by the Agreement. The Court shall retain jurisdiction over these claims solely for the purpose of enforcement of the Agreement. If noncompliance is not resolved through the corrective action process, as described above, the Court may enter any necessary orders to enforce the Agreement.

Id. at 200. On the next page, section XI-M of the Settlement Agreement, entitled "Termination of the Agreement," provides: **"The Agreement shall terminate in 48 months from the date it is given final approval by the Court."** *Id.* at 201 (emphasis added); App. 3. Termination was not subject to defendants achieving any set degree of compliance by the end of the four-year period. This provision was the result of compromises reached during the year of settlement negotiations. *See, e.g.*, C.A. App. 298-99, 314-16, 338-41, 346-48, 353-57, 362. There is nothing in the Settlement Agreement allowing the parties or the court to modify or extend this end date for any reason. Moreover, there is no provision in the Settlement Agreement

fixing an alternative way for defendants to end federal court oversight of the state agency.

After a hearing, District Court Judge David Winder gave the negotiated Settlement Agreement final approval and incorporated it into his order of August 29, 1994 (the "Consent Decree"). App. 2.

Two years later, plaintiffs started an enforcement proceeding, alleging defendants' noncompliance with the Consent Decree and accusing defendants of stalling implementation just to outlast the four-year term of the Settlement Agreement. *Id.* at 3-4. In March 1997 Judge Winder denied plaintiffs' request for appointment of a receiver to operate the Division of Child and Family Services and rejected the claim that defendants had acted in bad faith. *Id.* at 4; C.A. App. 226-30. But, based on three reports filed by the Monitoring Panel in 1995 and 1996, he found defendants in noncompliance with many provisions of the Consent Decree. Concluding the complex corrective action process set up by the parties had failed, the court ordered the parties to bypass it; instead, the court ordered the Monitoring Panel to prepare a new compliance report and a new Comprehensive Plan to correct any noncompliance found in it. App. 4.

In his ruling, Judge Winder nonetheless praised the State's efforts and noted its infusion of large amounts of human and financial resources into Utah's child protection system, its training of staff and foster parents, and its reorganization of relevant state agencies.[3] Then he cautioned, "The problems of

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[3]$190 million in new money was invested in Utah's child protection system from FY94 (including before commencement of this action) through FY97. C.A. App. 214-15.

child welfare are very complex. Defendants' task is large, and the recognition that to effectuate change requires time reflects no more than a healthy sense of realism." C.A. App. 226; *see also id.* at 223-24.

During the next fourteen months, no new compliance report was issued by the Monitoring Panel, and plaintiffs sought no further enforcement assistance from the federal court. Also in this interim, Judge Winder retired and the case was reassigned to District Judge Tena Campbell. C.A. App. 41-42.

Finally, on May 7, 1998, less than four months before the Settlement Agreement was to terminate, the Monitoring Panel released Report 97-1. For the first time, the Panel subdivided the 93 substantive provisions into 316 items. It found defendants in compliance with only 63, or 20%, of these items. C.A. App. 255-56.

A week later, plaintiffs filed a Motion to Extend the Settlement Agreement "to assure compliance by defendant and to further the goals of the Settlement Agreement." *Id.* at 262. Admitting that the Settlement Agreement was to expire by its own terms on August 29, 1998, and that the Panel had not yet prepared any Comprehensive Plan as ordered by Judge Winder, plaintiffs nonetheless sought extension of the Settlement Agreement until two years after defendants achieved full compliance. *Id.* at 248-49.

Plaintiffs contended the termination provision could be disregarded by the district court through exercise of: a) the enforcement power expressly given the court by the parties in section X-J of the Settlement Agreement; b) the court's inherent enforcement power; or c) the court's inherent modification power under the test of *Rufo v. Inmates of Suffolk County Jail*,

502 U.S. 367 (1992). As to this latter power, plaintiffs argued that the *Rufo* prerequisite of a "significant change of circumstances" was met because they could not reasonably have anticipated that defendants would not be in full compliance after four years. C.A. App. 263, 284.

Defendants opposed extension and asked the district court to enforce the unambiguous, bargained-for termination provision of the Settlement Agreement as written. Stressing that this case involves a voluntary, pretrial settlement agreement, they contended that neither the parties' agreement nor the court's inherent powers to enforce or modify a consent decree allowed the court to disregard the termination provision, the critical term of the parties' settlement. C.A. App. 309-26. Moreover, the *Rufo* prerequisite for equitable modification of the Settlement Agreement, "a significant change of circumstances," had not been satisfied. Defendants asserted that their failure to achieve full compliance within four years was foreseeable and actually foreseen by plaintiffs when the decree was entered. C.A. App. 326.

Judge Campbell concluded in early August 1998 that she could alter or delete the termination provision using inherent judicial authority to modify a consent decree as a court order. App. 23-29. Moreover, the *Rufo* test for modification was satisfied:

> Although there are no identifiable *changed* circumstances in this case, there are certainly unforeseen forces at work. [*Rufo*, 502 U.S. at] 384. The defendants have increased the funding to DCFS by 108.1%, from $48,902,700 in 1994 to $101,755,600 in 1997, yet these efforts have been accompanied by an actual decline in

> compliance with the terms of the [Settlement Agreement]: 25% [23/93] in 1994 and 20% [63/316] today. Neither the parties nor the court could have predicted back in 1994 that very substantial increases in funding would lead to higher levels of noncompliance with the [Settlement Agreement]. Such unforeseen circumstances provide an objective basis for equitable intervention by this court to rescue, if necessary, the purposes of the agreement.

App. 29 (footnote omitted) (emphasis in original). Judge Campbell declined to find any bad faith or malingering by defendants in their efforts to achieve compliance during the four-year life of the Consent Decree. Indeed, along with defendants, she found it "hard to imagine that a 49% increase in supervisors, a 60% increase in caseworkers, a 49% increase in support staff, and the hiring of 42 new contract case workers has actually led to a 5% decline in child welfare as the panel report suggests." *Id.* at 29 n.4.

Though she ruled she had the power to ignore the termination provision, Judge Campbell ultimately refused to exercise it, denying the Motion to Extend what she characterized as a "failed" agreement. *Id.* at 31.

Ten days later–only two weeks before termination of the Settlement Agreement by its own terms–plaintiffs filed a Motion to Enforce the Comprehensive Plan, invoking the court's "equitable authority to modify a consent decree if necessary to achieve the purposes of the decree." C.A. App. 406-07. They asked for this newly minted Plan, finally submitted by the Monitoring Panel seventeen months after Judge Winder's order, to replace the negotiated Settlement

Agreement adopted in 1994. C.A. App. 416-18. Defendants opposed the motion, reiterating their prior arguments about the court's lack of authority to ignore the termination provision and again asking the court to enforce the Settlement Agreement's termination provision as written. C.A. App. 419-21, 432-33, 436-39.

Dissatisfied with the new Comprehensive Plan, which she found incomplete, Judge Campbell took the motion under advisement in September 1998 (after the Settlement Agreement terminated by its own terms) and ordered defendants to work with the Panel to "supplement the record" with a complete Plan. In the meantime, she retained jurisdiction under the Settlement Agreement, minus the termination provision. C.A. App. 443-47.

A revised Plan was filed with the court in May 1999. App. 5. At a status conference in mid-October 1999, Judge Campbell made her intentions clear: "[I]t appears to me that I will be keeping jurisdiction until I am told by the monitor that it is fine for me to get out." C.A. App. 527-28. Four days later, she granted plaintiffs' Rule 60(b) motion, ordered defendants to comply with the new Comprehensive Plan in place of the Settlement Agreement, appointed a compliance monitor, and retained jurisdiction indefinitely to enforce the new Plan. App. 15-16.

On appeal, the Tenth Circuit Court of Appeals affirmed. The court held that the federal court's inherent equitable power to modify an unlitigated consent decree encompasses the power to change any provision over defendants' objection. That power extends to the unambiguous termination provision here, the court concluded, even if material to defendants' pretrial settlement of the lawsuit. App. 7-11.

First, the court saw no differences between requests by plaintiffs to modify material terms of a consent decree and requests by defendants to do so, or between proposed modifications of litigated consent decrees versus those of unlitigated consent decrees.[4] The court rejected defendants' argument that federal courts have no equitable power to modify provisions of the Consent Decree at plaintiffs' request that were material to defendants' voluntary submission to federal court oversight. Indeed, it found this argument foreclosed by *Rufo* itself. *Id.* at 7.

Second, the court held, "[w]hile it may be true that a court *interpreting* a consent decree is bound by an unambiguous termination provision contained in the decree, a court exercising its broad equitable power to *modify* the consent decree is not similarly constrained." *Id.* at 8 (emphasis in original). Third, the court concluded that parties cannot, through the terms of their pretrial settlement agreement, dictate the parameters of the federal court's otherwise broad, equitable power to modify consent decrees. *Id.* at 9.

Next, the Tenth Circuit rejected the argument that a federal court cannot materially "modify" an unlitigated consent decree's terms to impose substantial new obligations on defendants. This view was previously adopted by other circuits in *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141 (6th

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[4]Throughout this petition, the term "unlitigated consent decree" is used as a shorthand reference to any consent decree entered without an admission or adjudication that defendants have violated federal statutes or the United States Constitution. In contrast, a "litigated consent decree" is a remedial order negotiated by the parties and adopted by the district court to remedy past violations of federal law by defendants that have either been admitted or adjudicated.

Cir. 1992), and *Fox v. HUD*, 680 F.2d 315 (3rd Cir. 1982). App. 10-11. In any event, the Tenth Circuit concluded, excision of the four-year termination provision here did not materially add to the obligations Utah officials undertook in the Settlement Agreement. *Id.* at 11.

Finally, the appellate court found no abuse of discretion in the district court's exercise of its modification power. Defendants' unforeseen and "significant non-compliance" at the end of the four-year period constitutes the "significant change in circumstances" *Rufo* requires as a precondition to modification of a consent decree. App. 12-14.

REASONS TO GRANT THE PETITION

There is no question that, as a general proposition, a consent decree can be modified over defendants' objections, even if it was entered by the district court without any admitted or adjudicated violation of federal law by defendants. *See, e.g.*, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). The dispute here is whether that modification power is so broad as to permit a federal court to rewrite the material terms of an unlitigated consent decree entered into by State defendants, resulting in the imposition of significant new obligations on them. This Court's precedents, as well as the doctrines of federalism and separation-of-powers, tell us that the answer must be no.

The Tenth Circuit has reached the opposite conclusion, creating a conflict among the courts of appeals on this issue. As a consequence, the State of Utah no longer controls the operations of its Division of Child and Family Services, even though (1) the term of the consent decree negotiated by the

State has long since expired and (2) the defendants have never been adjudged to have violated federal law in operating the Division. This Court should grant certiorari to resolve the split among the courts of appeals and reaffirm that federal judges do not have the power to rewrite unlitigated consent decrees–over the objection of state officials–under the guise of equitable modification.

I. The Courts of Appeals are Divided as to Whether a Federal District Court has the Authority to Rewrite a Material Term of an Unlitigated Consent Decree.

The Tenth Circuit concluded an unambiguous term of an unlitigated consent decree that was material to the defendants' voluntary consent to federal court oversight can be changed to rescue plaintiffs' original litigation goals, embodied in the rest of the decree. This ruling conflicts with those of three other circuit courts of appeals.

The Sixth Circuit has steadfastly respected the finality of pretrial settlements adopted as consent decrees. In *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992), *cert. denied*, 509 U.S. 905 (1993), the Sixth Circuit reversed an order that "modified" an unlitigated consent decree by eliminating the $1 million expenditure cap on the Ohio defendants' liability for desegregation efforts. The court concluded the modification sought by plaintiffs "stands contrary to, and effectively eviscerates the terms of the State's consent, from which the district court derived its authority to enter the consent judgment." *Id.* at 1153. The court continued:

> We hold that a district court may not, in the name of modification, circumvent the express terms of a defendant party's consent in the

> absence of an adjudicated or admitted violation of law. . . . [T]he district court's authority to impose additional obligations on a defendant is constrained by the terms of agreement entered by the parties to the consent decree.

Id. Accord United States v. Michigan, 940 F.2d 143 (6th Cir. 1991) (reversing a modification order, entered over defendants' objection, that extended a programming classification plan to prison facilities other than those enumerated in the pretrial consent decree); *see also Heath v. DeCourcy*, 888 F.2d 1105, 1109-10 (6th Cir. 1989) (affirming a modification order but noting that "[a] modification will be upheld if it furthers the original purpose of the decree in a more efficient way, *without upsetting the basic agreement of the parties.*") (emphasis added).

The Third Circuit agrees that an unlitigated consent decree can be fine-tuned over defendants' objections, but not rewritten by the court. In *Harris v. City of Philadelphia*, 137 F.3d 209, 210 (3rd Cir. 1998), in which prison over-crowding was challenged, the court vacated a district court order that modified and expanded what the parties had agreed to in the unlitigated consent decree. Relying on precedent from this Court, the panel refused to impose new terms on the noncomplying defendants in order to better serve the district court's conception of the decree's ultimate purposes. *Id.* at 212. Because settling defendants waive their due process right to contest the issues raised in plaintiffs' complaint, the panel reasoned, a court should not later modify the decree by interposing terms not agreed to by the parties or included in the

decree.[5] *Id.* (citing *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959); *Hughes v. United States*, 342 U.S. 353, 357-58 (1952)).

Earlier, in *Fox v. United States Dep't of Housing and Urban Dev.*, 680 F.2d 315 (3rd Cir. 1982), the HUD Secretary and others had been sued to enjoin their urban renewal projects in Philadelphia as contravening federal housing law. Defendants admitted no such violations in the negotiated pretrial settlement adopted by the federal court as a consent decree, under which HUD had no obligations to provide construction financing for the low-income housing to be built. Three years later, plaintiffs obtained a modification of the decree that required HUD to set aside $11 million in GNMA construction financing at a 7.5% interest rate for the redevelopment project, without which the project could not succeed. Though plaintiffs' goals had been frustrated by changes in the mortgage market, the Third Circuit held the decree could not be altered to put this substantial new burden on defendants. *Id.* at 323-24. "To impose additional duties under the decree because of those changes is to disregard the basic rights of litigants who waive their right to litigate defenses by consenting to have a decree entered against them. The conditions upon which rights are waived must be respected."

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[5] *Compare Holland v. New Jersey Dep't of Corrections*, 2001 WL 326853, *11 (3rd Cir. April 4, 2001) (permitting extension of consent decree as remedial sanction for noncompliance where defendants had settled case before trial and paid more than $5 million in damages to class members for past discrimination); *Commonwealth of Pennsylvania v. Local Union 542*, 807 F.2d 330, 331 (3rd Cir. 1986) (approving extension of litigated consent decree entered against union defendants who had intentionally discriminated).

Id. at 323 (citing *Armour*, 402 U.S. at 682; *Atlantic Refining Co.*, 360 U.S. at 23; *Hughes*, 342 U.S. at 357).

Similarly, the Second Circuit recently enforced the bargain reached by the defendant union in a consent decree settling a civil RICO action. Under the original decree, the government was required to pay costs of a rerun election, and the appellate court reversed the lower court's modification order requiring the defendant union to pay those costs. *United States v. International Brotherhood of Teamsters*, 141 F.3d 405, 408 (2nd Cir. 1998). The panel concluded a court may not replace the negotiated terms of a consent decree with its own, no matter how much of an improvement it would make in effectuating the decree's goals. *Id.*

Two years earlier, the Second Circuit had refused to revive a litigated consent decree, which had expired by its own terms, against defendants who had illegally discriminated. *EEOC v. Local 40*, 76 F.3d 76 (2nd Cir. 1996). "In the presence of the decree's termination clause, the district court does not have indeterminate power to ensure compliance with its terms." *Id.* at 80. The court concluded the language of the decree should define the obligations of the parties and that the defendant union was entitled to the benefit of its bargain. *Id.* at 81. If the union was again discriminating in violation of federal law, the solution was for plaintiffs to bring a new lawsuit. *Id.* at 81 n.3.

In contrast, the Tenth Circuit has now approved a federal judge's "modification" of an unlitigated consent decree that guts the parties' pretrial settlement. In the absence of admitted or adjudicated violations of federal law, a federal court should not be allowed to do so, even to achieve the original decree's laudable goals or to rescue dissatisfied

plaintiffs from an ill-advised settlement bargain. As this Court aptly put it in declining a party's request to rewrite the express terms of a consent decree, "we should leave the [plaintiffs] where we find them, especially since the place where we find them is the one where they agreed to be." *Swift*, 286 U.S. at 119.

II. The Tenth Circuit's Decision Conflicts with *Firefighters Local Union No. 784 v. Stotts*, 467 U.S. 561 (1984).

The ruling below cannot be reconciled with this Court's precedents concerning limits on a federal court's power to rewrite the parties' pretrial settlement under the rubric of equitable modification.

In *Firefighters Local Union 784 v. Stotts*, 467 U.S. 561, 574 (1984), this Court held that a federal court's order, whether viewed as one remedying past violation of an unlitigated consent decree or one modifying it, cannot go outside the decree itself or a governing statute. The 1980 consent decree, in which defendants did not admit any violations of federal law, set goals for hiring blacks as half of the new hires on the defendant municipal fire department and for giving 20% of promotions in each job category to blacks. *Id.* at 566. The next year budget deficits forced municipal layoffs under its "last hired first fired" rule. Because this rule would result in many newly hired blacks being laid off, the district court modified the decree to protect their jobs, viewing the budget deficits as a new and unforeseen circumstance. *Id.* at 568.

This Court, reversing the Sixth Circuit Court of Appeals, reaffirmed *Armour*'s dictate that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the

parties to it" or by what "might have been written had the plaintiff established his factual claim and legal theories in litigation." *Id.* at 564 (quoting *Armour*, 402 U.S. at 681-82). *Stotts* held the circuit court had erred in concluding the order was a legitimate modification of the decree that could be imposed without the defendant city's consent. *Id.* at 583. First, the parties had not addressed or "settled" on the disputed issue of whether the city's seniority system would be used or disregarded in an economic downturn. Second, the order imposed on the parties as an adjunct of settlement something "that could not have been ordered had the case gone to trial and the plaintiffs proved a pattern or practice of unlawful discrimination." *Id.* at 578.

Stotts thus clearly rejects disappointed plaintiffs' belated use of the federal court's broad modification power to change substantially the deal they reached with defendants at settlement.[6] This is consistent with the Court's previous decisions concerning the limits on that power. *E.g.*, *United States v. Ford Motor Co.*, 335 U.S. 303 (1948) (declining to modify termination provision at plaintiff's request to serve original goal of enjoining violations of Sherman Anti-Trust Act); *United States v. International Harvester Co.*, 274 U.S. 693, 703 (1927) (refusing plaintiff's request to change consent decree and impose a new and substantial burden on defendants, who were entitled to rely on the agreement as written).

Stotts also reflects this Court's unswerving directive that federal courts construe and enforce consent decrees to honor the compromises they embody, not the original suit's goals. "[A]

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[6]A court can materially change a consent decree enforcing a statute in order to conform to changes later made in that statute. *E.g.*, *System Fed. No. 91 v. Wright*, 364 U.S. 642, 650-51 (1961).

consent decree or order is to be construed for enforcement purposes basically as a contract." *ITT Continental Baking Co.*, 420 U.S. at 228; *e.g.*, *Atlantic Refining Co.*, 360 U.S. at 23 (rejecting plaintiff's new interpretation of consent decree language); *Hughes* 342 U.S. at 357 (rejecting strained interpretation of consent decree language that would better serve decree's basic purpose). As the Court explained in *Armour:*

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. . . . The resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve . . . . Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected . . . .

Armour, 402 U.S. at 681.[7]

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[7]As *Stotts* and *Armour* make clear, a court cannot modify a consent decree under the guise of enforcing that decree. If this Court granted certiorari and reversed the Tenth Circuit's holding that the district court could modify the Settlement Agreement by deleting the termination provision, it would necessarily follow that the district court could not reach the same end by purporting to exercise its inherent enforcement authority. The Agreement itself gives the district court no more authority than that, providing in section XI-J that "[t]he Court shall retain jurisdiction over these claims solely for the purpose of enforcement

Here, in removing the termination provision from the Consent Decree, the Tenth Circuit has refused to follow what this Court has held repeatedly, i.e., that parties *can* agree to settlement terms that constrain the federal court's exercise of its inherent judicial powers.[8] Instead, the Tenth Circuit misread this Court's 1992 decision in *Rufo* as determining that a district court can modify any term of any consent decree, even a term material to defendants who have never been adjudged to have violated federal law. App. 7.

In *Rufo*, this Court approved of modifying a provision in a litigated consent decree to permit double-bunking in a jail, if the requesting governmental defendants first demonstrated a significant change in circumstances since entry of the decree. 502 U.S. at 383. The Court reached this result despite the plaintiff prisoners' objection that the original provision, which prohibited double-bunking, was "the most important element of the relief sought" to correct unconstitutional overcrowding found at the facility. *Id.* at 373, 387.

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of the Agreement."

[8]Indeed, legal commentators and practitioners have long recommended inclusion of a termination clause in pretrial settlements of civil rights lawsuits. "Even a provision limiting the court's jurisdiction to a specified time period is valid if the parties have bargained for the provision in good faith, and the district court approves the decree . . . ." Lloyd Anderson, "Release and Resumption of Jurisdiction Over Consent Decrees in Structural Reform Litigation," 42 *U. Miami L. Rev.* 401, 404 (1987); *accord* Thomas Mengler, "Consent Decree Paradigms: Models Without Meanings," 29 *Boston College L. Rev.* 291, 245 (1988); Thomas Bergdall, "A Practitioner's Guide to Injunctive Civil Rights Settlements and Consent Decrees," 531 *PLI/Lit* 305, 330 (1995) (urging inclusion of "absolute sunset clause").

Rufo is inapposite here for two reasons. First, it involved a *litigated* consent decree entered as a remedial order after the governmental defendants were found to have maintained unconstitutional conditions at a jail. Changing the material terms of a litigated consent decree entered against governmental defendants who have violated federal law does not raise due process, federalism, or separation-of-powers concerns. Second, the material modification approved in *Rufo* was proposed by the defendants and opposed by the plaintiffs. Changing the material terms of a litigated consent decree over the objections of plaintiffs likewise raises no due process, federalism, or separation-of-powers concerns. Thus, *Rufo* does not resolve the question posed to the Tenth Circuit and presented here.

III. The Tenth Circuit Erroneously Determined that Excising the Termination Provision Does Not Materially Alter the State Defendants' Obligations.

The Tenth Circuit erroneously determined that removing the termination provision from the Consent Decree is not a material modification because it would place no additional burdens on Utah officials. App. 11.

The appellate court's affirmance allows a federal judge to run Utah's Division of Child and Family Services not just for four years, as the parties agreed in 1994, but in perpetuity–or at least until the monitor tells Judge Campbell that "it is fine for [her] to get out." C.A. App. 527-28. It is hard to imagine a term of an unlitigated consent decree more material to state defendants' voluntary submission to federal court authority than the unambiguous four-year termination provision here. Without it, Utah officials would not have agreed to settle this lawsuit at all, or they would have negotiated a very different settlement

agreement, such as one that established clear standards for ending federal court stewardship of the state agency at some fixed and measurable level of compliance.

Instead, Utah officials struck a bargain with the plaintiffs in 1994, submitting to four years of federal court stewardship of the Utah Division of Child and Family Services' operations. In return, plaintiffs obtained judicially enforceable provisions in the decree far beyond what federal law would have mandated even if they had succeeded at trial, such as those concerning screening and investigation of complaints and protective services for children not in state custody.

Though he did not have to, Judge Winder adopted the four-year termination provision as a term of the unlitigated Consent Decree. Petitioners reasonably relied on the termination provision in making critical decisions and choices throughout the four-year enforcement period. For example, they opted to work to improve compliance rather than run to court to change compliance standards, measuring tools, or mandated practices that had proved unworkable or impossible in the real world, however promising they had seemed to the parties in 1994.

Plaintiffs have never contended, and Judge Campbell did not rule, that the four-year termination provision was immaterial to the parties' pretrial settlement. The Tenth Circuit's *sua sponte* determination that deletion of the termination provision through modification does not materially increase defendants' obligations is belied by the express terms of the Consent Decree. The ruling erroneously renders the unconditional and unambiguous termination provision in the parties' agreement completely meaningless, contrary to Tenth Circuit precedent and applicable construction principles of Utah

contract law,[9] as well as this Court's directives in *Armour* and *ITT Continental Baking Co.*, discussed above.

IV. The Tenth Circuit's Decision Raises Serious Federalism and Separation-of-Powers Concerns and Will Discourage Use of Pretrial Consent Decrees.

As Judge Winder recognized, the problems of implementing court-ordered changes that revamp an entire agency are formidable. C.A. App. 226. "A structural injunction requires change over a period of time in the organization, procedures, or physical facilities of large-scale institutions such as prisons, mental hospitals, welfare agencies, and large corporations." Lloyd Anderson, "The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation," 1983 *U. Ill. L. Rev.* 579, 583.[10] *See, e.g., Willie M. v. Hunt*, 732 F. 2d 383 (4th Cir. 1984) (decades-long federal court enforcement of decree reforming state foster care system).

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[9] *See Sinclair Oil Corp. v. Scherer*, 7 F.3d 191, 193 (10th Cir. 1993) (concluding obligations of parties must be found within four corners of unlitigated consent decree, construed in accordance with state's contract construction principles); *Dixon v. Pro Image, Inc.*, 987 P.2d 48, 52 (Utah 1997) (court construing contract must give effect to parties' intentions, gleaned first from unambiguous terms); *Plateau Mining Co. v. Utah Div. of State Lands*, 802 P.2d 720 (Utah 1990) (construing contract terms according to their plain meaning preserves parties' intent and protects against judicial revision of contracts).

[10] *Accord* Eric Rosand, "Consent Decrees in Welfare Litigation: The Obstacles to Compliance," 28 *Colum. J. L. & Soc. Probs.* 83, 84, 96-97 (1994); Lloyd Anderson, " The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation," 1983 *U. Ill. L. Rev.* 579, 579-82; Marcia Lowry, "Derring-Do in the 1980s: Child Welfare Impact Litigation after the Warren Years," 20 *Fam. L.Q.* 255, 274-78 (1986).

At the same time, long-term judicial stewardship of executive agency operations leads to budget constraints, loss of administrative control, and the "myriad hassles of monitoring and often 'co-administering' complex programs." Thomas Bergdall, "A Practitioner's Guide to Injunctive Civil Rights Settlements and Consent Decrees," 531 *PLI/Lit* 305, 321 (1995); *accord* Anderson, 1983 U. Ill. L. Rev. at 579-80. Such practical considerations prompted congressional enactment of the 1995 Prisoner Litigation Reform Act, which provides a statutory method for ending federal court oversight of prison operations under consent decrees. *See* 18 U.S.C. § 3626(b)(1)(A) (2000).

The district court and the Tenth Circuit, on the other hand, see no practical or legal difficulties in a judge's indeterminate operation of an unconsenting executive agency, one whose child protection function is quintessentially a matter for the elected branches of government. This unfettered view of judicial authority ignores the separation-of-powers principles underpinning American governmental organization at all levels. It also ignores the serious federalism issues raised whenever plaintiffs ask a federal court to enforce or modify consent decrees against state governmental defendants in institutional reform cases.[11]

In *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 247-48 (1991), this Court noted both concerns arising from the Tenth Circuit's view of a 1972 remedial desegregation decree as enforceable in perpetuity

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[11]*See* Paul Mishkin, "Federal Courts as State Reformers," 35 *Wash. and Lee L. Rev.* 949, 971 (1978); Alan Effron, "Federalism and Consent Decrees Against State Governmental Entities," 88 *Colum. L. Rev.* 1796, 1808-10 (1988).

against a school board that had intentionally discriminated. The Court rejected that view, stressing the importance of reinstating local autonomy over public institutions once violations of federal law had ceased: "Local control over the education of children allows citizens to participate in decision making, and allows innovation so that school programs can fit local needs. The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities." *Id.* at 248 (citations omitted).

This Court repeated its earlier admonition, in *Milliken v. Bradley*, 433 U.S. 267, 282 (1977), that, under our federal system's allocation of powers, federal court decrees remedying adjudicated violations of federal law must directly address and relate to those violations. *Dowell*, 498 U.S. at 247. It did so again in *Rufo*, which likewise involved wrongdoing defendants: "Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated." 502 U.S. at 389; *accord Stotts*, 467 U.S. at 583 & n.16 (declining to uphold challenged order as valid remedial order under section 1983 in the absence of proof or admission of discriminatory conduct).[12]

This "inherent limitation upon federal judicial authority," *Milliken*, 433 U.S. at 281, repeatedly enforced by the Court in the context of *litigated* consent decrees against culpable defendants must be enforced with equal vigor to restrain federal courts from belatedly recrafting *unlitigated*

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[12]*See also* 18 U.S.C. § 3626(b)(2) (2000) (providing for immediate termination of consent decrees in prison conditions lawsuits that were entered without a judicial finding that the relief granted corrects violation of federal law).

consent decrees against state officials never found to have violated federal law.

Finally, the Tenth Circuit's expansive view of the scope of a federal judge's power to modify unlitigated consent decrees deprives State defendants of incentive to settle federal lawsuits aimed at reforming governmental institutions, such as prisons, schools, mental hospitals, welfare programs, or foster care systems. Such settlements have been a useful alternative to costly and risky institutional reform litigation, one that often best served the interests of plaintiffs, defendants, and taxpayers, while conserving scarce judicial resources.[13] Notwithstanding the acknowledged benefits of pretrial settlements, however, "[n]o one will sign a consent decree if the other party is free to walk away from it." *Duran v. Elrod*, 760 F.2d 756, 760 (7th Cir. 1985).

If disgruntled plaintiffs can invoke the federal court's modification power in order to alter key terms negotiated in pretrial consent decrees, defendants' only viable choice is to put plaintiffs to their proof in every case. Even if they do so and lose on the federal law claims, any resulting remedial decree will, unlike the modified Consent Decree here, be restricted to provisions that are linked to remedying violations of federal rights.

Ironically, the Utah officials who consented to settle this lawsuit are now in a much worse position than they would be in had they proceeded to trial and lost on the federal claims. Given the breadth and detail of the substantive provisions of the Consent Decree, the Tenth Circuit's ruling gives a federal judge far more sweeping power to control and run Utah's child

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[13]*See* Lloyd Anderson, "Implementation of Consent Decrees in Structural Reform Litigation," 1986 *U. Ill. L. Rev.* 725, 726-27; Rosand, 28 *Colum. J. L. & Soc. Probs.* at 100-01.

protection agency into the indeterminate future than the court could have validly exercised after finding defendants in violation of federal law.

Petitioners urge this Court to grant certiorari and settle whether, in the absence of admitted or adjudicated violations of federal law, a federal court has the inherent power to alter material provisions of an unlitigated consent decree over defendants' objections.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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June 2001

APPENDIX

United States Court of Appeals, Tenth Circuit

DAVID C., Nicholas N., Dora D., Martin B., Agnes W., Kenny G., by their next friend, Donna Brown; Bella, Peter, Esther, and Mary F., by their next friend, Carol T.; Jonas, Brenda, Mercy, and Cynthia A., and Caroline, Sarah, and Timothy P., by their next friend, Shirley Z.; on their own and on behalf of others similarly situated,

Plaintiffs-Appellees,

v.

Michael LEAVITT, in his official capacity as Governor of Utah; Robin Arnold-Williams, in her official capacity as Director of the Department of Human Services; Ken Patterson, in his official capacity as Director of the Division of Child and Family Services,

Defendants-Appellants.

No.99-4223 March 9, 2001

Appeal from the United States District Court for the District of Utah, (D.C. No. 93-CV-206).

Before TACHA, Chief Judge, McWILLIAMS, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

I. INTRODUCTION

*1 Appellees brought a class action lawsuit against Appellants, officials of the State of Utah (hereinafter "Utah"), alleging federal constitutional and statutory violations in the operation of Utah's child welfare system. After the district court extended the deadline for answering the complaint, the parties were involved in settlement negotiations for a full year. The parties eventually entered into a settlement agreement (the "Agreement") which imposed numerous obligations to investigate reports of child abuse or neglect within specific deadlines; provide placement support services for foster parents; and ensure that foster children attend school and receive medical and dental treatment. The Agreement was incorporated into a final order signed by the district court on August 29, 1994 (the "Consent Decree"), and its provisions became binding on the parties.

By its terms, the Agreement was to terminate four years after it was approved by the district court. At the end of the four-year period, however, Utah was not in compliance with the terms of the Agreement. Appellees filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking relief from the four-year termination provision. The district court granted the relief requested and Utah appealed. Exercising jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), we **affirm.**

II. FACTUAL BACKGROUND

As a means to cure the constitutional and statutory violations alleged by Appellees, Utah agreed to implement ninety-three substantive provisions contained in the Agreement. In addition to delineating the obligations assumed by Utah, the Agreement contained procedures designed to insure compliance with those obligations. One provision established a three-member panel (the "Monitoring Panel") and charged this panel with the task

of evaluating Utah's compliance. The Monitoring Panel was empowered to make findings of compliance or non-compliance with each provision of the Agreement. If the Monitoring Panel made a finding of non-compliance, it was directed to develop a corrective action plan which Utah was obligated to implement within a specified period of time. Under the Agreement, a party could challenge the findings of the Monitoring Panel. The district court would then enter its own finding of compliance or non-compliance after reviewing the evidence *de novo*.

The Agreement also contained a provision entitled "Enforcement of the Agreement" (the "Enforcement Provision"). This provision states, in part,

> The Court shall retain jurisdiction over these claims solely for the purpose of enforcement of the Agreement. If non-compliance is not resolved through the corrective action process, as described above, the Court may enter any necessary orders to enforce the Agreement.

Another provision, entitled "Termination of the Agreement" provided, "The Agreement shall terminate in 48 months from the date it is given final approval by the Court."

*2 Two years after the Agreement was approved by the district court, Appellees, alleging Utah was either unable or unwilling to fulfill the obligations it undertook pursuant to the terms of the Agreement, filed a Motion to Enforce Settlement Agreement and Appoint Receiver. In support of their motion, Appellees relied on three Monitoring Panel reports, each of which found Utah in non-compliance with a majority of the provisions in the Agreement. Additionally, Appellees argued that Utah's non-compliance had not been remedied through the corrective action process and alleged that Utah was engaged in

a bad-faith attempt to try and outlast the four-year term of the Agreement.

On March 17, 1997, the district court entered an order granting Appellees' motion in part and denying it in part. After independently reviewing the reports submitted by the Monitoring Panel and related information, the court found Utah in non-compliance with the Agreement and, thus, in non-compliance with the Consent Decree. After concluding that the corrective action process set forth in the Agreement had failed, the court ordered the parties to bypass the corrective action process and further ordered the Monitoring Panel to prepare a new plan for correcting any non-compliance (the "Comprehensive Plan"). Utah was ordered to implement the Comprehensive Plan. The court, however, denied Appellees' request to appoint a receiver to oversee the Division of Child and Family Services.

On May 13, 1998, Appellees filed a Motion to Extend the Term of the Settlement Agreement. Appellees conceded in their motion that the Agreement was set to expire by its own terms on August 29, 1998. Appellees argued, however, that the Enforcement Provision gave the court the authority to enter all necessary enforcement orders, including the authority to enter an order extending the terms of the Agreement to ensure compliance with its terms. In the alternative, Appellees argued that the district court possessed the inherent equitable power to modify the Agreement by extending the term of the Agreement and the court's jurisdiction over it. Although the district court concluded that it possessed the equitable power to modify the Agreement, it also concluded that "without some additional proposal for reforming the system so that it will work," the plaintiff class would not benefit from an extension of the term of the Agreement. The court thus declined to exercise its

equitable power and denied Appellees' motion. The court stated, however, "If the parties are able to negotiate a new settlement agreement that incorporates the lessons acquired in the last four years, this court will certainly give a hard look at such a proposal."

On August 14, 1998, two weeks before the Agreement was set to expire, the Comprehensive Plan was filed with the court. Appellees immediately filed a Motion to Enforce the Comprehensive Plan. In their brief to the court in support of their motion, Appellees characterized the Comprehensive Plan as a specific proposal that would "replace *procedural* mechanisms of the Agreement that had proved ineffective." Appellees requested that the district court retain jurisdiction until Utah had fully implemented the Comprehensive Plan. The district court took Appellees' motion under advisement and ordered Utah to refine the Comprehensive Plan. Utah was ordered to submit the completed Comprehensive Plan to the court "for purposes of supplementing the record."

*3 The revised Comprehensive Plan was filed in May 1999. The district court, after reviewing the revised Comprehensive Plan, granted Appellees' motion, extended the term of the Agreement, and retained jurisdiction over the implementation of the Comprehensive Plan. Utah then brought this appeal.

III. DISCUSSION

A. Standard of Review

The parties first disagree on whether the district court's inherent equitable power to modify the Agreement encompassed the power to alter the Termination Provisions. [FN1] This question involves the scope of the district court's authority and thus is a

question of law which this court reviews *de novo*. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576-78 (1984); *cf. Hull v. United States*, 971 F.2d 1499, 1504 (10th Cir. 1992) ("The scope of the district court's authority to specify the form of an award of damages is a question of law...."). Assuming the court possessed such power, the parties also disagree on whether the court properly exercised that power in this case. This question is reviewed under the abuse of discretion standard. *See EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 799-800 (10th Cir. 1979). The district court's factual findings are reviewed for clear error. *See Manning v. United States*, 146 F.3d 808, 812 (10th Cir. 1998).

> FN1. Utah also argues that a district court, when interpreting a consent decree to determine the parameters of the court's enforcement powers over the decree, is bound by the unambiguous language used in the decree. It relies upon the Supreme Court's statement that a consent decree must be "construed for enforcement purposes basically as a contract." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975). Utah then vigorously argues that under the plain language of the Termination Provision, judicial enforcement could not be extended beyond August 28, 1998. It further argues that an order extending judicial intervention is not an order which enforces the terms of the Agreement and thus the court did not have the power under the Enforcement Provision to alter the plain language of the Termination Provision. In light of our conclusion, *infra*, that the district court's order was a permissible *modification* of the Agreement, it is unnecessary for this court to address the argument that the district court's order was not a permissible *interpretation* of the Agreement. *See id.* at 236 n.9

(discussing two cases in which the Court applied contract principles to construe a consent decree but left open the possibility of equitable modification of the decree); *see also United States v. Knote*, 29 F.3d 1297, 1302 (8th Cir. 1994) ("[E]ven if the structure, language, and context of the decree did not combine to render the district court's interpretation of the text permissible, the district court has the inherent equitable power to modify a consent decree. . . ." (Quotation omitted)). It is, likewise, unnecessary for this court to address Appellees' argument that the district court's order extending judicial intervention was a valid exercise of the court's power under the Enforcement Provision to enforce its March 17, 1997 order.

B. The Scope of the District Court's Equitable Modification Power

Utah concedes that courts possess the equitable power to modify consent decrees when changed circumstances support modification. Utah argues, however, that the court's modification power is circumscribed and cannot be exercised to substantially alter an unambiguous provision that is material to the parties' agreement. Utah contends that the Termination Provision is not properly subject to equitable modification because it is both unambiguous and a material provision that "lies at the very heart of the parties' deal settling this lawsuit without going to trial."

Utah's position that courts have no equitable power to modify material provisions is foreclosed by *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992). In *Rufo*, the district court refused to order modification of a consent decree, in part, because the provision was "an important element . . . perhaps

even the most important element" of the decree. *See Inmates of the Suffolk County Jail v. Kearney*, 734 F.Supp. 561, 565 (D. Mass. 1990). The Supreme Court, however, specifically addressed and unambiguously rejected the district court's conclusion, stating that "[i]f modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible. That cannot be the rule. The District Court was thus in error in holding that . . . modification of the [provision] was necessarily forbidden." *Rufo*, 502 U.S. at 387. Thus, it is apparent from *Rufo* that a court's equitable modification power extends to material provisions in a consent decree.

**4 In support of its position that a court's equitable power is circumscribed by an unambiguous termination provision in a consent decree, Utah relies on cases in which the court was interpreting the decree, not exercising its equitable modification powers. *See, e.g., South v. Rowe*, 759 F.2d 610, 613 (7th Cir.1985); *Sanders v.. Shell Oil Co.*, 678 F.2d 614, 617-18 (5th Cir.1982). The issue we address here, however, is whether the district court possessed the equitable power to modify its own order if changed circumstances warrant such modification. We do not address the question of whether the district court erred in interpreting the terms of the Agreement or exceeded its authority in enforcing the Agreement. *See supra*, note 1. While it may be true that a court charged with *interpreting* a consent decree is bound by an unambiguous termination provision contained in the decree, a court exercising its broad equitable power to *modify* the consent decree is not similarly constrained. Thus, the authority upon which Utah relies is inapposite. Additionally, if we accept Utah's argument, in every modification case the district court would be required to make an initial determination whether the termination provision is

ambiguous. We decline to impose any such obligation on the court.

Contrary to Utah's assertions, a court's equitable power to modify its own order in the face of changed circumstances is an inherent judicial power that cannot be limited simply because an agreement by the parties purports to do so. *See South*, 759 F.2d at 613 ("Of course, the parties could not agree to restrict the court's equitable powers to modify its judgment enforcing the consent decree, including the two-year limitation period, in light of 'changed circumstances.'"). A court's broad, equitable power to modify its own orders is not limited to modification of ambiguous provisions. To hold otherwise would allow the parties, by the terms of their agreement, to divest a court of its equitable power or significantly constrain that power by dictating its parameters.

Finally, Utah argues that courts can exercise their equitable powers to relieve defendant parties of obligations they assumed when they entered into unlitigated decrees, but that courts have no authority to modify unlitigated consent decrees if the modification expands the defendant party's obligations. Utah submits that the district court thus lacked the authority to modify the Termination Provision because the modification expanded the obligations it voluntarily assumed under the terms of the Agreement.

Utah concedes generally, as it must, that a court sitting in equity has the authority to modify an unlitigated consent decree. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) ("We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . If the reservation had been omitted [from the terms of the decree], power there still would be by

force of principles inherent in the jurisdiction of the chancery."); *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 646-47 (1961). It is equally settled that a court has the equitable power to impose additional obligations on a defendant party to a consent decree when the decree is entered into after an adjudication of wrongdoing on the part of the defendant. *See United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251 (1968). Utah, however, attempts to distinguish between the scope of a court's power to modify litigated consent decrees and its power to modify unlitigated decrees. It argues that a court has no authority to modify an unlitigated consent decree if the modification imposes additional, substantial obligations on the defendant party. *See Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1153 (6th Cir.1992); *Fox v. HUD*, 680 F.2d 315, 323 (3d Cir. 1982).

***5** If we unconditionally accept Utah's argument, a plaintiff party to an unlitigated consent decree could never seek equitable modification of the decree pursuant to Rule 60(b) of the Federal Rules of Civil Procedure because any such modification would invariably impose an additional obligation on the defendant party. The plain language of Rule 60(b), however, makes no distinction between plaintiffs and defendants but allows either "party" to seek relief from a judgment or order. *See* Fed.R.Civ.P. 60(b). Thus, Rule 60(b) does not categorically prohibit a plaintiff party to an unlitigated consent decree from seeking modification of the decree. Additionally, nothing in *Rufo* limits its application to cases in which modification is sought by the defendant party. *See Rufo*, 502 U.S. at 383 (stating the holding by using the neutral language, "a party seeking modification" and "[i]f the moving party meets this standard"); *see also Juan F. v. Weicker*, 37 F.3d 874, 879 (2d Cir.1994) (applying *Rufo* in a case where modification was sought by the plaintiff party); *Williams v.*

Edwards, 87 F.3d 126, 131-32 (5th Cir.1996) (same). We reject the general proposition that only defendants can seek equitable modification of unlitigated consent decrees.

It is unnecessary for this court to decide whether a court lacks authority to modify an unlitigated consent decree in a way that materially expands the defendant party's obligations because this case does not present that question. Here, the district court granted Appellees relief from the four-year Termination Provision by extending the term of the Agreement. Regardless of how Utah attempts to characterize the court's modification, the extension of the term of the Agreement to allow Utah to fulfill the very obligations it voluntarily undertook when it entered into the Agreement is not itself an imposition of additional, material obligations on Utah. We thus reject Utah's argument that the district court lacked authority to modify the Termination Provision because the modification expanded its obligations. [FN2]

> FN2. Our conclusion is the same whether Utah's argument is construed as a claim that the district court exceeded its authority when it modified the Termination Provision or a claim that the district court abused its discretion when it exercised its authority.

Having considered and rejected each of Utah's arguments, we conclude that the district court had the authority to modify the Termination Provision. [FN3]

> FN3. Utah has not argued that modification of the Termination Provision is prohibited because it would conflict with federal law or violate public policy. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467

U.S. 561, 576 n.9 (1984). We, therefore, do not address this issue.

C. The District Court's Exercise of its Equitable Modification Power

In *Rufo*, the Supreme Court formulated a two-step process to determine whether a consent decree in an institutional reform litigation case should be modified and the extent of any such modification. *See* 502 U.S. at 383. Under the *Rufo* approach, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* When attempting to show the requisite change in circumstances, however, the party seeking modification ordinarily cannot rely "upon events that actually were anticipated at the time it entered into a decree." *Id.* at 385. If the moving party can meet its initial burden, the court may modify the decree if the modification is "suitably tailored to the changed circumstance." *Id.* at 383.

***6** Appellees argue that Utah's significant non-compliance with the terms of the Agreement at the end of the four-year period constitutes a changed circumstance that supports equitable modification. Utah appears to concede that its non-compliance is a significant change in circumstances, but argues Appellees have failed to meet their initial burden under *Rufo* because the non-compliance was both foreseeable and actually foreseen by Appellees when they entered into the Agreement. *See id.* at 385 (holding that movant is ordinarily not entitled to modification of consent decree if the changed circumstances were actually foreseen at the time of the agreement).

Utah's argument that non-compliance with the terms of a consent decree is always foreseeable and thus can never constitute a changed circumstance is clearly foreclosed by Supreme Court precedent. The proper focus is on whether Utah's non-compliance was *actually foreseen* by Appellees, not whether the non-compliance was *foreseeable*. *See id.* at 384, 386 n.10 (rejecting a standard that would require the movant to show that the changed circumstance was not foreseeable).

Utah also maintains that Appellees were well aware when they entered into the Agreement that compliance would not be completed within four years and thus the changed circumstances were actually foreseen by Appellees. Utah contends that Appellees failed to meet their burden of demonstrating a "significant change of fact" because they failed to show that they did not actually foresee the non-compliance. While it is true that Appellees, as the moving party, bear the burden of demonstrating that they did not actually foresee Utah's significant non-compliance, the district court's conclusion that Appellees satisfied that burden is amply supported by the evidence presented to the court.

The district court found that Utah was "20 percent in compliance and 80 percent in noncompliance" with the provisions of the Agreement. The court's finding of Utah's substantial non-compliance is supported by four reports prepared by the Monitoring Panel. Utah conceded at oral argument that it has never contested the non-compliance figures contained in the Monitoring Panel reports. Thus, the district court's finding of substantial non-compliance is not clearly erroneous. Based on the findings of substantial non-compliance, the district court concluded that "[n]either the parties nor the court could have predicted back in 1994 that very substantial increases in funding would lead to higher levels

of noncompliance with the [Agreement]. Such unforseen circumstances provide an objective basis for equitable intervention by this court to rescue, if necessary, the purposes of the agreement."

Utah's arguments notwithstanding, it would defy logic for Appellees to agree to include the four-year Termination Provision in the Agreement if they actually foresaw that Utah would not be in substantial compliance with the terms of the Agreement at the end of the four-year period. Based on the evidence before the district court, the court could reasonably conclude that Utah's significant non-compliance was not actually foreseen by Appellees. Accordingly, the district court's conclusion that the Agreement should be modified to extend the term of the Agreement was not an abuse of discretion. [FN4]

> FN4. Utah has not argued that the modification was not suitably tailored to remedy the changed circumstance. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992). We therefore, do not address that issue. *See Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998) (holding that arguments not raised in opening brief are waived).

IV. CONCLUSION

*7 The district court had the equitable power to modify the Termination Provision and the court properly exercised that power under the facts of this case. Consequently, the district court's order modifying the Agreement is hereby **affirmed.**

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DAVID C., et al.,	:	
Plaintiffs,	:	ORDER
vs.	:	
MICHAEL LEAVITT, et al.,	:	Civil No. 2:93-CV-206C
Defendants.	:	

On October 15, 1999, the court held a hearing in this matter. For the reasons set forth at the close of the hearing, the court orders as follows:

1. The Comprehensive Plan, referred to by defendants as "a business plan," shall be implemented by defendants.

2. The Child Welfare Policy and Practice Group will remain as the monitor, services to be paid for by defendants at a standard fair rate.

3. Defendants shall file periodic progress reports, as provided for in the Comprehensive Plan, with copies to the court, the plaintiffs, and the monitor.

4. Defendants have twenty (20) days from this date to respond to Comment 1 of Plaintiffs' Proposed Revisions to the Comprehensive Plan, regarding protocols for screening hotline calls for investigation. Plaintiffs have twenty (20) days from defendants' filing to respond. If deemed necessary by the court, the court will then schedule an evidentiary hearing on the matter. Plaintiffs' other proposed revisions to the Comprehensive Plan are taken under advisement.

5. Plaintiffs' proposal for Alternative Dispute Resolution is taken under advisement.

6. For the reasons set forth in this court's August 4, 1998 order, this court retains jurisdiction over the implementation of the settlement agreement, now referred to as the Comprehensive Plan. The parties should be aware that this court's doors remain open if the plaintiffs, the monitor, or DCFS discovers at any later time that portions of the plan are ill-conceived or otherwise rendered unworkable by changing circumstances. The plan is intended to be a dynamic document and should reflect that the parties have an obligation to seek modifications from this court if the plan is no longer working.

SO ORDERED this 18th day of October, 1999.

BY THE COURT:
/s/
Tena Campbell
United States District Judge

DAVID C., et al., Plaintiffs,

v.

Michael LEAVITT, et al., Defendants.

Civil No. 2:93-CV-206C.

United States District Court,
D. Utah,
Central Division.

Aug. 4, 1998.

ORDER

CAMPBELL, District Judge.

This matter is before the court on the plaintiffs' motion to extend the term of the consent decree. The court heard argument from counsel on July 20, 1998; Ms. Jeanne Finberg, Ms. Martha Matthews, and Ms. Patrice McElroy appeared on behalf of the plaintiffs and Ms. Carol Clawson and Ms. Carolyn Nichols appeared on behalf of the defendants. Having fully considered the arguments of counsel, the memoranda of the parties, and applicable legal authority, the court now enters the following order.

V. *Structure of the Settlement Agreement.*

On February 25, 1993, plaintiffs initiated this class-action lawsuit against the Governor of the State of Utah and other state officials involved in Utah's child-welfare system (collectively referred to as "defendants"). The plaintiff class is (1) all children who are now or will be in the custody of the Department of Human Services ("DHS") and who have been or will be placed by DHS in a sheltercare facility, foster-family home, group home, or institutional care; and (2) all children who are or will be known to DHS by virtue of a report of abuse or neglect.

After substantial negotiation, the parties entered into a settlement agreement (the "SA") on May 17, 1994. The SA sets forth ninety-three provisions to be implemented by the defendants, which are designed to improve the policies and practices governing Utah's child-welfare system. In general, these provisions relate to the screening and investigation of abuse and neglect complaints; the improvement of shelter care, family services, health care, and education for foster children; preparation of treatment plans; and the training and supervision of caseworkers and foster parents.

The SA also establishes a monitoring panel consisting of three individuals: one chosen by plaintiffs' counsel, one by

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[1] The history of the case provided here is a summary of the more extensive treatment given by the Hon. David K. Winder in his Memorandum Decision and Order Granting In Part And Denying In Part Plaintiffs' Motion to Enforce Settlement Agreement and Appoint Receiver ("March 17 Order").

defendants, and one agreed upon by the parties. The panel exists to oversee defendants' implementation of the ninety-three SA provisions, to publish quarterly reports documenting the extent of defendants' compliance or noncompliance with these provisions, and to evaluate the Corrective Action Plan ("CAP") that defendants develop in response to the quarterly reports.

Finally, the SA provides that "[t]he Agreement shall terminate in 48 months from the date it is given final approval by the Court." (Settlement Agreement § XI.M.) The court gave final approval to the SA on August 29, 1994, thereby setting an expiration date of August 28, 1998. The court retained the power to "enter any necessary orders to enforce the Agreement." (Settlement Agreement § XI.J.), and also incorporated the terms of the SA by reference into its order of August 29, 1994.

VI. *Parties' Performance of Procedural Obligations Under the Settlement Agreement.*

To date, the performance report/CAP feedback mechanism, which the parties had hoped would provide the defendants with significant guidance in reforming the Department of child and Family Services ("DCFS"), has failed to function in any meaningful sense. The panel has never published performance reports on a quarterly basis as contemplated; two reports were released in 1995, one in 1996, and one in 1998. Even on those occasions when the panel did release a report, the CAP mechanism was not properly implemented. After the release of the first performance report in March 1995, the parties were to have a panel-approved CAP in place within four weeks. Instead, the two sides failed to reach any agreement and the panel failed to impose its own CAP (as allowed by the SA) until August 4, 1995. Even after

the first CAP was in place, the defendants failed to relate to the panel within the ninety days allowed by the SA whether they had successfully implemented necessary changes. Nor, indeed, did the defendants provide such information to the panel at any later time.

Following release of the second report on February 2, 1996, the monitoring panel rejected several CAPs submitted by the defendants. After the last such rejection, the defendants did not submit another revised CAP and the panel did not create its own. The parties encountered similar difficulties following submission of the third report on July 3, 1996; the defendants again failed to submit a CAP in a timely manner and the panel again rejected the defendants' plan without formulating one to replace it.

Reviewing this history, Judge Winder concluded, in his March 17 Order, that there had been a "breakdown of the Corrective Action Process." (March 17 Order at 20, 6-7.) He therefore ordered that the parties suspend the ordinary procedural mechanisms required by the SA. The panel was directed to prepare a report for the months from October 1996 through March 1997. Upon submission of the report, the panel was further instructed to inform the court what resources it would need to prepare a comprehensive plan for future action by the defendants. In August 1997, the court amended its earlier order, requiring now that the report cover the six month period from January through June 1997. The monitoring panel submitted the required report at the end of April 1998, ten months following the close of the monitoring period, and, despite Judge Winder's prior order, did not request any additional resources with which to complete the comprehensive plan. Although plaintiffs' counsel represented at argument that the parties had made substantial efforts to complete the

comprehensive plan, as of the date of this order, the monitoring panel has not filed any comprehensive plan with this court.

VII. *Defendants' Performance of Substantive Obligations Under the Settlement Agreement.*

The defendants have fared no better in achieving compliance with the substantive terms of the SA than in conforming to its procedural mandates. To date, both the panel and Judge Winder have found the defendants to be in noncompliance with a majority of the SA's ninety-three provisions. (March 17 Order at 21-22.) Specifically, the panel has reported the following findings (rounded to the nearest percentage) in each of its performance reports:

Report 95-1:	%
Compliance	12
Compliance with Concerns	13
Noncompliance with Progress	35
Noncompliance	16
No data/inconclusive	24

Report 95-2:	%
Compliance	09
Compliance with Concerns	25
Noncompliance with Progress	53
Noncompliance	09
No data/inconclusive	05

Report 96-1:	%
Compliance	04
Compliance with Concerns	16
Noncompliance with Progress	57
Noncompliance	21

No data/inconclusive	01
Report 97-1:	%
Compliance	20
———	
Noncompliance with Progress	18
Noncompliance	54
No data/inconclusive	07

In early 1995, therefore, the defendants were 25 percent in compliance and 75 percent in noncompliance.[2] As of the most recent report, four years after the implementation of the SA, the defendants were 20 percent in compliance and 80 percent in noncompliance. In other words, as progress is measured by the SA, there has been none. *See also* Plaintiff's Mem. Supp. at 3 ("[I]t is difficult to ascertain *any* measurable progress in the entire four-year period with the terms of the Settlement Agreement."); March 17 Order at 8 ("In Plaintiffs' view, the Reports demonstrate that . . . the system has actually deteriorated since the SA took effect.").

Because of the failure to achieve the anticipated goals within the four-year term contemplated by the SA, the plaintiffs have asked the court to extend the SA until two years after the date on which defendants finally achieve full compliance. Defendants oppose the plaintiffs' request, arguing that the

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[2] The most recent monitoring panel report explains that a "No Documentation" finding is "not a neutral measure of performance. It is a finding of deficiency. While 'No Documentation' may not be as serious as a finding of noncompliance, it does represent a failure to demonstrate performance. If it is a common finding, 'No Documentation' reflects a significant systemic problem because compliance cannot be determined." (*Executive Summary* at 5.)

explicit term of the SA relating to its termination date is binding upon the parties and upon this court.

Discussion

VIII. *Does this Court have the Power to Modify the Termination Date of the Settlement Agreement?*

I. *General Power to Modify Judicial Orders Arising Out of Institutional Reform Litigation.*

Defendants' opposition to the plaintiffs' motion is based on their contention that, as with a contract, the court has no power to modify an express term of the SA to impose burdens upon the defendants to which they have not willingly consented. According to the defendants, the SA, and particularly the SA's termination date, are the result of a hard-fought compromise not to be undone by the court; defendants argue, essentially, that "in exchange for the saving of cost and elimination of risk, the parties each gave up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971).

[1] The defendants are, of course, correct, that any request for modification, either by the plaintiffs or by the defendants, should be viewed with great caution.[3] If litigants

[3] The defendants urge that modifications placing an additional burden on a party should be evaluated under a different standard than modifications relieving a party of such a burden. The court rejects a dual standard. Any deviation from the initial terms of the settlement agreement deprives one party of its bargain, in the form of lesser benefit to the plaintiffs or greater duties imposed upon the defendants. The potential harm resulting from any such modification is therefore the same - future litigants, aware that their settlement terms are not completely

cannot rely on the courts to enforce their bargains, they will enter into them only reluctantly or not at all. It is also true, however, that the SA is not merely a private contract; the parties in this case deliberately requested that this court place its imprimatur upon their bargain by adopting it as an order of the court. Therefore, as with all consent decrees, the SA is both "a voluntary settlement agreement which could be fully effective without judicial intervention" and also "a final judicial order . . . [that] places the power and prestige of the court behind the compromise struck by the parties." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir.1983).

[2] The simple fact that the SA is also a judicial order, and not just a contract, gives this court equitable power to modify its terms. *See Juan F. v. Weicker*, 37 F.3d 874, 878 (2nd Cir.1994) ("[I]n implementing the purposes of a decree, a court is not rigidly confined only to the terms contained within the four corners of the parties' agreement."); *Lorain NAACP v. Lorain Board of Education*, 979 F.2d 1141, 1148 (6th Cir.1992) ("Because of their dual character, consent decrees may be

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binding upon the court, may be more reluctant to settle their claims. Thus, there is no good reason in logic to view one type of modification more favorably than the other.

The few courts to address this issue have reached a similar conclusion: "[W]e reject defendants' suggestion that the *Rufo* standard for flexible modification can benefit only defendants seeking relief from burdensome requirements. *Rufo's* flexibility is designed to permit details in complicated decrees, such as this one, to be adapted to changing conditions so that the public interest can be preserved." *Juan F. v. Weicker*, 37 F.3d 874, 879 (2nd Cir. 1994). *See also Johnson v. Robinson*, 987 F.2d 1043, 1050 (4th Cir. 1993) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 379-80, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)).

'treated as contracts for some purposes but not for others.'") For example, the court would be well within its power to modify the SA should it find that failure to do so would cause its own order to become an instrument of injustice. *See Williams v. Edwards,* 87 F.3d 126, 132 n. 18 (" '[A] court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.' "). Given this general inherent authority to modify judicial orders, and the existence of Section XI.J of the SA, by which the parties specifically requested that this court retain continuing power to enter any necessary modifications, the defendants' suggestion that the court treat the SA purely as a private contract is simply untenable.

[3] Nor is the court's participation in the SA the only significant difference between this case and an ordinary contract dispute. The bargain struck by the parties affects more than the rights of the immediate litigants; the public has an independent interest in the efficacy of the child-welfare system in this State that must also be satisfied by the agreement. Although private parties are free to enter into virtually any agreement, even an ill-advised one, the parties in this case stand in a different position. If, in hindsight, the court were to find that the agreement created systemic flaws in this State's child-welfare system or required the expenditure of limited funds in a counterproductive manner, it would be no defense to modification to assert that the parties freely bargained for the obligation in question. As Judge Poser has noted in the context of other institutional reform litigation:

> A consent decree that regulates a public agency "is no mere contract, even though reference to contract principles may be useful." This is not to say that the decree ought just be discarded . . . No one will sign a

> consent decree if the other party is free to walk away from it. But in deciding whether to modify a decree the district judge cannot just appeal to the sanctity of contracts; he must consider the concrete impact of modification on both parties, and also on the public.

Duran v. Elrod, 760 F.2d 756, 760 (7th Cir.1985) (quoting *New York State Assn. for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 37 (2nd Cir.1979)). Because the SA has a significant impact on nonlitigants, the terms chosen by the parties are entitled to deference, but not dispositive weight. This court cannot confine itself solely to an examination of the parties' preferences, turning a blind eye to the impact of those preferences on the public interest.

Finally, those circuit courts which have addressed the problems of long-term institutional reform litigation have also found broad powers of modification necessary if the district court is to incorporate its growing experience under the decree in a common sense fashion. *See, e.g., Lorain NAACP*, 979 F.2d at 1149 ("[B]roader judicial discretion to modify the parties' agreement 'is required so that the agreed upon solution to the problem giving rise to the litigation may be fine-tuned to accomplish its goal.'"); *Kozlowski v. Coughlin*, 871 F.2d 241, 247 (2nd Cir.1989) (" 'As experience with [institutional reform] litigation increases, a consensus is emerging among commentators in favor of modification with a rather free hand.'"); *Albert v. Klevenhagen*, 46 F.3d 1347, 1365 (5th Cir.1995) ("[T]here is little question that the district court has wide discretion to interpret and modify a forward-looking consent decree."). Therefore, in light of the SA's status both as a judicial order and as a settlement arising out of institutional reform litigation, the court finds that it has more power to enter

modifications than if this were, as defendants urge, simply a matter of contract interpretation.

B. *Limitations on the Court's Power to Modify the SA.*

[4] Although the court is not constrained to simple obedience to the parties' terms, neither is its power to entertain modifications unlimited. In its recent decision in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992), the Supreme Court endorsed the flexible standard promulgated by the lower courts:

> A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees . . . .
> The upsurge in institutional reform litigation . . . has made the ability of a district court to modify a decree in response to changed circumstances all the more important.
> The experience of the District Courts . . . in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of the litigation. The Courts of Appeals have also observed that the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions."

Rufo, 502 U.S. at 378-79, 381, 112 S.Ct. 748 (quoting *Heath v. DeCourcy,* 888 F.2d 1105, 1109 (6th Cir.1989)).

As the Court also noted, though, an unfettered power of modification would render the actual terms of the parties' agreement nugatory and discourage settlement. *Id.* at 383, 112 S.Ct. 748. The Supreme Court therefore imposed a single prerequisite upon district courts' exercise of equitable power:

> Although we hold that a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that a modification will be warranted in all circumstances. Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is no longer convenient to live with the terms of the consent decree. Accordingly, a party seeking modification of a consent decree *bears the burden of establishing that a significant change in circumstances warrants a revision of the decree* . . . .

Id. at 383, 112 S.Ct. 748 (emphasis added) (internal citations omitted). The requirement of changed circumstances strikes the necessary balance between the public interest and the reasonable expectations of the parties by ensuring that no party will lose the benefit of its bargain absent some unanticipated and objectively verifiable circumstance.

[5] Although there are no identifiable *changed* circumstances in this case, there are certainly unforeseen forces at work. *Id.* at 384, 112 S.Ct. 748. The defendants have increased the funding to DCFS by 108.1%, from $48,902,700 in 1994 to $101,755,600 in 1997, yet these efforts have been

accompanied by an actual decline in compliance with the terms of the SA: 25% in 1994 and 20% today.[4] Neither the parties nor the court could have predicted back in 1994 that very substantial increases in funding would lead to higher levels of noncompliance with the SA. Such unforeseen circumstances provide an objective basis for equitable intervention by this court to rescue, if necessary, the purposes of the agreement. *Id.* at 384, 112 S.Ct. 748 ("Modification is also appropriate when a decree proves to be unworkable because of unforeseen circumstances."). The court therefore concludes that it has power to entertain plaintiff's motion.

IX. *Should the Court Exercise its Discretionary Power to Modify?*

[6] This court's determination that it has power is only part of the inquiry, however; whether the court should use its power is a separate question. Although the higher courts have articulated very few factors for this court consider in the exercise of its discretion, there is no doubt that the court must determine whether the proposed modification furthers the

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[4] The defendants asserted at oral argument that the SA measurement devices focus on improper factors and do not actually measure increases in child welfare. There is some appeal to the defendants' argument on this point. It is hard to imagine that a 49% increase in supervisors, a 60% increase in caseworkers, a 49% increase in support staff, and the hiring of 42 new contract case workers has actually led to a 5% decline in child welfare as the panel report suggests. Nevertheless, the defendants' standing to make such an argument is substantially undercut by two facts. First, the defendants, who have great expertise in this area, agreed in 1994 that the SA measurement devices were suitable for use in this case. Second, despite the court's broad powers to modify the terms of the SA, the defendants have, in four years, never made a motion to modify on the ground that the measurements were inaccurate.

purpose of the consent decree. *See Kozlowski v. Coughlin*, 871 F.2d 241, 247-8 (2nd Cir. 1989) ("The analysis must identify the essential purpose or purposes of the decree in question and weigh the impact of the proposed modification on that ultimate objective.'"); *Lorain NAACP*, 979 F.2d at 1148 ("The modification of an institutional consent decree will be upheld 'if it furthers the original purpose of the decree in a more efficient way.'"). In determining whether to exercise its power, then, the court must determine whether the modification requested by the plaintiffs serves the purpose of the SA by improving child welfare.

Even if it works well, the SA does not come without some cost to the plaintiffs. Funds that would otherwise be available for the direct provision of services to the plaintiff class must be diverted to a system of secondary oversight. When the oversight mechanisms work, when they produce useful feedback and a history of successful, measurable results, the resulting gains to the plaintiff class will outweigh the somewhat diminished services that they receive. When the oversight mechanisms do not work, however, the maintenance of the SA is nothing more than a net loss of direct services to the children of this State.

The plaintiffs repeatedly insist that there has been no measurable improvement in child welfare in the last four years. The plaintiffs may well be right. During the four years of experience under the SA, the feedback mechanisms designed by the parties have proven to be unworkable or unrealistic. The panel has never been able to complete quarterly reports as anticipated and has only approved one CAP for implementation by the defendants. The defendants, in turn, failed ever to report back to the panel on their progress under that lone CAP. Thus, the quarterly dialogue between the panel and DCFS envisioned

in the SA has been almost nonexistent. Perhaps as a result of this failure of communication, or perhaps for other reasons discussed above, the SA has registered a net decline of child welfare even while the State increased its funding of DCFS by 108.1%.

None of this history relied upon by the plaintiffs provides a persuasive rationale for pumping more money into a settlement that has, accordingly to its strongest proponents, completely failed. To the contrary, without some additional proposal for reforming the system so that it will work, continued funding of the SA at this point would appear to be nothing more than throwing good money after bad.[5] Without some better justification, the court will not order the defendants to divert additional funds away from direct services to the plaintiff class without a demonstrable corresponding benefit. Because the proposed modification, an extension of the life of the SA, would not be likely to provide a benefit to the plaintiff class, the court declines to extend the SA. *See Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir.1994) (upholding extension of decree where district court

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[5] Plaintiffs recognize this problem and suggest that following extension of the SA, they may come to the court with additional motions for modification to compensate for any deficits in the current arrangement. *See* Plaintiff's Supp. Mem at 15 ("[P]laintiffs are not at this time asking the Court to make any specific rulings on how compliance . . . is to be achieved. That issue may need to be addressed in a subsequent motion . . ."). The court cannot proceed in this manner, though, because it has no basis for weighing the merit of those unspoken requests. The court cannot indefinitely extend the life of the SA as part of an exercise in speculation about which changes plaintiffs might propose in the future, when they might propose them, and if those proposed changes will have the necessary effect. The only issue which the court can fairly consider at this point is whether to extend the life of a failed agreement.

found that "the goals of the decree 'will be fulfilled in a short period of time and this action will then come to an end.'").

The end of the SA does not necessarily leave plaintiffs without a remedy, however. If the parties are able [to] negotiate a new settlement agreement that incorporates the lessons acquired in the last four years, this court will certainly give a hard look at such a proposal. And even if the parties cannot reach a new agreement, the plaintiffs remain free, as they always have been, to initiate new litigation to determine the existence or nonexistence of current constitutional violations.

Order

For the foregoing reasons, plaintiff's motion to extend the term of the settlement agreement is DENIED.